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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

CITY OF POLSON, MONTANA,

Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the original Flathead Indian Reservation in Montana, as established in 1855, was disestablished by the Act of April 23, 1904, 33 Stat. 302.

2. Whether the Hell Gate Treaty of 1855, which established the Flathead Indian Reservation, conveyed beneficial title to the bed and banks of the south half of Flathead Lake to the tribes of that reservation, thereby defeating the title of the future State of Montana to all navigable waterways.

3. Whether owners of land riparian to the south half of the Flathead Reservation own water to the low water mark.

4. Whether an Indian tribe has the authority to regulate the use of the bed and banks of navigable waters within an original reservation by non-Indian owners of riparian lands.

Only the first listed question will be discussed in this Petition. The other questions are fully discussed in the separate Petition for Writ of Certiorari filed by the State of Montana and the Namens, and the City adopts and incorporates the arguments made in that Petition by reference herein.

LIST OF PARTIES BELOW

The parties to the proceedings in the Court of Appeals were the City of Polson, the State of Montana, the United States, the Confederated Salish and Kootenai Tribes, Tribal Chairman Thomas E. Pablo, James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen.

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The Petitioner, City of Polson, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 11, 1982.

OPINIONS BELOW

The District Court issued its first opinion in this litigation on August 14, 1974. This opinion, reported at 380 F. Supp. 452, was affirmed by the Court of Appeals on May 12, 1976, in an opinion reported at 534 F.2d 1376. A petition for writ of certiorari from this judgment was later denied by this Court. 429 U.S. 929 (1976). A subsequent memorandum decision was issued by the District Court on September 20, 1979. This unreported decision was fully incorporated in the District Court's third opinion of April 8, 1980, which is also unreported. The opinion of the Court of Appeals from which review is sought was entered on January 11, 1982, and is reported at 665 F.2d 951. A timely filed petition for rehearing with suggestion that rehearing be en banc was denied on March 10, 1982. The preceding decisions are reproduced as Appendices A-E to the Petition for Writ of Certiorari filed by the State of Montana and the Namens in this matter, which Appendix is incorporated herein by reference.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was entered on January 11, 1982. A timely filed petition for rehearing was denied on March 10, 1982. The time for filing this petition was extended to July 1, 1982, by order of Justice Rehnquist dated May 20, 1982. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Because of their length, the Treaty of Hell Gate, 12 Stat. 975 (1855), and the Act of April 23, 1904, 33 Stat. 302, are set forth in the Appendix to the petition of the State and the Namens as Appendices F and I.

Also involved are the following statutes which amended the Act of April 23, 1904: the Act of June 21, 1906, 34 Stat. 325, 353-54, and the Act of March 3, 1909, 35 Stat. 781, 795-96. Because of their length, the relevant portions of these statutes are appended separately to this Petition.

STATEMENT OF THE CASE

The issue of the status of the original Flathead Reservation was initially considered by the District Court in Confederated Salish and Kootenai Tribes v. Namen,

380 F. Supp. 452 (D. Mont. 1974) (State App. D),[1] aff'd, 534 F.2d 1376 (9th Cir.) (State App. E), cert. denied, 429 U.S. 929 (1976). Relying on the decision in Mattz v. Arnett, 412 U.S. 481 (1973), the court stated in a footnote that the original reservation existed to the full extent of its pre-1904 boundaries. 380 F. Supp. at 457 n.5. Subsequently, the City of Polson in 1975 brought a declaratory judgment action against the Tribes, seeking a redetermination of the issue of reservation status. Jurisdiction was invoked under 28 U.S.C. § 1331(a). In 1977, the United States sued the City and the State of Montana, requesting a declaratory judgment that the original reservation had not been disestablished by the Act of 1904. Jurisdiction for this complaint was based on 28 U.S.C. § 1345. These two actions were consolidated with the original Namen case.

On September 20, 1979, the District Court ruled that the 1855 Flathead Reservation had not been disestablished or diminished by the 1904 Act. Confederated Salish & Kootenai Tribes v. Namen, Civ. No. 2343 (D. Mont., September 20, 1979). This holding was incorporated in the court's final judgment of April 8, 1980. Confederated Salish & Kootenai Tribes v. Namen, Civ. No. 2343 (D. Mont., April 8, 1980) (State App. B). That part of the opinion relating to reservation status was

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1. Citations to "State App." refer to the Appendix submitted with the Petition for Certiorari filed by the State of Montana in this case.

affirmed by the Court of Appeals on January 11, 1982. Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982) (State App. A). It is that decision which is the subject of this Petition.

The historic Flathead or Jocko Reservation in northwestern Montana was first established in 1855 by the Treaty of Hell Gate, 12 Stat. 975, and originally comprised approximately 1,245,000 acres. See, e.g., Confederated Salish & Kootenai Tribes v. United States, 437 F.2d 458, 460, 479 (Ct. Cl. 1971). In 1904, Congress enacted the statute in question which provided for the allotment of lands in severalty to individual Indians, and for the opening of the unallotted lands to public settlement and entry. Act of April 23, 1904, 33 Stat. 302. Approximately 227,000 acres were allotted to Indians under that Act. See, e.g., [1920] Comm'r Indian Affairs Ann. Rep. 91. In addition, some 45,000 acres were set aside for power and reservoir sites, 18,500 acres were set aside for the National Bison Range, and 60,000 additional acres were granted to the State of Montana for school purposes. See, e.g., Confederated Salish & Kootenai Tribes v. United States, supra at 479. Act of April 23, 1904, 33 Stat. at 303-04; Act of May 23, 1908, 35 Stat. 251, 267; Act of March 3, 1909, 35 Stat. 781, 796; Act of March 4, 1909, 35 Stat. 1039, 1051; [1920] Comm'r Indian Affairs Ann. Rep. 91.

Over one million acres remained for non-Indian entry and settlement under the homestead and townsite laws, and these lands were opened on May 2, 1910, pursuant

to the Presidential Proclamation of May 22, 1909. See 40 I.D. 57 (1910). The City of Polson is located on one of the original townsites established under the 1904 Act and the amendatory Act of June 21, 1906, 34 Stat. 325, 354.

Not all of the opened surplus lands were actually disposed of to settlers. A series of Orders of the Secretary of the Interior have restored a significant amount of land to tribal ownership and to reservation status pursuant to Sections 3 and 7 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 463 and 467. See Order of April 21, 1936, 1 Fed. Reg. 666; Order of December 11, 1937, 3 Fed. Reg. 5; Order of July 28, 1939, 4 Fed. Reg. 3581; Order of December 12, 1941, 7 Fed. Reg. 489; Order of March 3, 1942, 7 Fed. Reg. 2490; Order of August 29, 1956, 21 Fed. Reg. 6681; Order of May 28, 1958, 23 Fed. Reg. 3584; Order of May 4, 1961, 26 Fed. Reg. 4015; Order of December 2, 1964, 29 Fed. Reg. 16827. Consequently, some 615,000 acres, or about half of the original reservation, is held by the United States in trust for the Confederated Tribes and for individual Indians, and the remaining acreage is held in fee, primarily by non-Indians. See, e.g., Confederated Salish & Kootenai Tribes v. Namen, 380 F. Supp. 452, 457 n.5 (D. Mont. 1974) (State App. D). Only about 19% of the total population of the original reservation area consists of tribal members.

The dispute over reservation status arises in the context of the allocation of governmental jurisdiction

among state, local, federal, and tribal governments in the original Flathead Reservation area. Cf. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). The disposition of this case will in large part determine the extent to which the State of Montana and its political subdivisions may exercise jurisdiction over the area in question. A determination that the Flathead Reservation presently exists to the extent of its 1855 boundaries will divest the State and local governments of much of their civil, regulatory, and taxing authority within the area in question.[2] See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976); DeCoteau v. District County Court, supra at 427 n.2; McClanahan v. Arizona State Tax Commission, 412 U.S. 164 (1973). It is important to note that this jurisdictional dispute involves only lands within the original reservation boundaries which are not held in trust

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2. In 1965, the State assumed criminal jurisdiction over all lands within the original reservation which might be considered "Indian country," pursuant to Public Law 280, Act of August 15, 1953, 67 Stat. 590. See Mont. Rev. Codes §§ 83-801, et seq. The State would thus retain this jurisdiction regardless of reservation status. The State and its subdivisions, with the consent of the Tribes, also exercise civil jurisdiction over the following matters arising within the area in question: school attendance; public welfare; domestic relations (except adoptions); mental health and care of the infirm, aged, and afflicted; juvenile delinquency; adoption proceedings, when consented to by tribal court; abandoned, dependent, neglected, orphaned, and abused children; and the operation of motor vehicles on public streets and highways.

for the Tribes or individual Indians. The City acknowledges that those lands which were restored to reservation status pursuant to 25 U.S.C. § 467 presently constitute an Indian reservation, and that existing Indian trust allotments are "Indian Country" under 18 U.S.C. §1151(c) and therefore enjoy a similar status. See, e.g., DeCoteau supra at 427 n.2.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS REPRESENTATIVE OF THE PRESENT CONFUSION REGARDING A RECURRING ISSUE OF NATIONAL IMPORTANCE

As will be demonstated below, the decision of the Ninth Circuit and its treatment of the 1904 Flathead Act appear to contradict the decision of this Court in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), regarding similar bills. Surplus lands acts of this type, which provide for an "opening" of reservation lands to non-Indian settlement, rather than an outright cession of lands to the United States, have been the subject of much confusion in the courts. See e.g., United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem., 446 U.S. 980 (1980); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973); City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972); Ute Indian Tribe v. Utah, 521 F. Supp. 1072 (D. Utah 1981), appeal

docketed, No. 81-1901 (10th Cir., August 1981); State v. Janis, 317 N.W.2d 133 (S.D. 1982).

Although the Court's decision in Rosebud indicates that express language of cession is not required in order to disestablish an Indian reservation, the present confusion has arisen because of the existence of cession language in the earliest of the three statutes considered in Rosebud. There has been a considerable degree of uncertainty regarding the importance of that cession language to the Court's holding pertaining to the two non-cession statutes in Rosebud, with the result that lower courts have continued to emphasize the absence of explicit cession language in holding that similar surplus lands statutes did not have the effect of disestablishment. This problem of interpretation is of nationwide significance, because many such "sell and dispose" statutes involving millions of acres of land, were enacted in the early part of this century. See, e.g. Act of February 14, 1913, 37 Stat. 675; Act of May 11, 1912, 37 Stat. 111; Act of June 27, 1910, 36 Stat. 533; Act of June 1, 1910, 36 Stat. 455; Act of May 30, 1908, 35 Stat. 558; Act of May 29, 1908, 35 Stat. 460; Act of May 29, 1908, 35 Stat. 458; Act of March 1, 1907, 34 Stat. 1015, 1035; Act of June 21, 1906, 34 Stat. 325, 335; Act of June 5, 1906, 34 Stat. 213; Act of March 3, 1905, 33 Stat. 1048, 1069; Act of December 21, 1904, 33 Stat. 595.

Further guidance from this Court is therefore necessary to resolve the existing confusion, and to affirm and clarify the decision in Rosebud.

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. An Examination of All the Relevant Factors, in Light of the Decisions of this Court, Leads to the Unmistakable Conclusion that Congress Intended To Disestablish the Original Flathead Reservation.

1. The Principles Applicable to Determinations of this Type.

At the heart of this case is the question of the proper approach to the construction of Indian surplus lands acts in light of the recent relevant decisions of this Court. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973). Each of these cases, like the instant case, involved statutes which provided for the opening of Indian reservation lands to non-Indian settlement, and all examined the question of whether the particular statutes resulted in the termination of the reservation status of the affected lands.

The principles applicable to inquiries of this kind were most recently stated by this Court in Rosebud Sioux Tribe v. Kneip, supra. As the Court stated, "[t]he mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." 430 U.S. at 586-87 (emphasis added). On the other hand, the intent of Congress controls, and "[i]n all cases, 'the face of the Act', the

'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." Id. at 587.

2. An Examination of the Face of the 1904 Act, Its Legislative History, and the Surrounding Circumstances Clearly Demonstrates the Disestablishment Purpose of the Act.

a. The face of the 1904 Act.

The Flathead Act of 1904 provided for the survey of the reservation, the allotment of lands to individual Indians, the classification and appraisal of the surplus lands, and the opening of the remainder to settlement and entry under the homestead, mineral, and townsite laws. This Act contains no express language of disestablishment. On the other hand, the operative provisions of the Act do not differ in any material respect from other surplus lands statutes of the period which have been found to have the effect of disestablishment. See, e.g., Rosebud, supra at 608-09, 612-14 (1907 and 1910 Acts); Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). Moreover, the Flathead Act does not stand alone, but was enacted during the same week as three other surplus lands acts. Act of April 23, 1904, 33 Stat. 254; Act of April 27, 1904, 33 Stat. 319; Act of April 27, 1904, 33 Stat. 352. These include the 1904 Act construed by this Court in Rosebud and an

act pertaining to the Crow Reservation in Montana, which has also been held to have the effect of disestablishment. See Little Light v. Crist, 649 F.2d 682, 683, 686-90 (9th Cir. 1981); State v. Bad Horse, 602 P.2d 1113, 1117-18 (Mont. 1980); In Re Little Light, 598 P.2d 572, 573 (Mont. 1979). As this Court instructed with respect to the 1907 and 1910 Rosebud Acts, which bear a strong similarity to the Flathead Act, surplus lands statutes "must be considered in context." Rosebud, supra at 606 n.30. The context of the 1904 Flathead Act unquestionably includes the 1904 Rosebud and Crow Acts.

Two particular provisions of the Flathead Act strongly support a finding of disestablishment. One such provision is set forth in Section 8, which grants sections 16 and 36 of every township to the State of Montana for school purposes. 33 Stat. at 303-04. This Court has fully explained the significance of such a provision in its discussion of substantially identical provisions in the three Rosebud Acts. Rosebud at 599-601, 608 n.35. As the Court noted, the Enabling Act under which both Montana and South Dakota were admitted into the Union specified that the sixteenth and thirty-sixth sections of every township were to be granted to each State upon its admission, except that those sections then included within Indian reservations were not subject to the grant "until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain." §10, Act of February 22, 1889, 25 Stat. 679 (emphasis added). See Rosebud at 599-600; Little Light

v. Crist, 649 F.2d 682, 689 n.9 (9th Cir. 1981) (appendix to opinion). Thus, for the Flathead Act, as for the Rosebud Act of the same date, the "natural construction . . . is to read a congressional intent to disestablish . . . , thereby making the sections available for disposition to the State . . . under §10 of the [Enabling Act]."[3] Rosebud at 601.

An additional section indicating a purpose of disestablishment is Section 21, added by a 1909 amendment to the Act.[4] Act of March 3, 1909, 35 Stat. 781, 795-96. This section subjected the allotted, retained, and surplus lands to a twenty-five-year prohibition against the introduction of intoxicants. It is virtually identical to §10 of the 1910 Rosebud Act, which was fully explicated in Rosebud, supra at 613.

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3. In the Flathead Act, as in the Rosebud Act," the legislative history . . . demonstrates that Congress 'included the provision to implement the grant in the enabling act and for no other reason.'" Rosebud at 600, quoting Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975). Both the House and Senate Reports explicitly noted that the school lands provision of the Flathead legislation was "in accordance with the enabling act of Montana." H.R. Rep. No. 1678, 58th Cong., 2d Sess. at 2 (1904) (State App. J); S. Rep. No. 1930, 58th Cong., 2d Sess. at 3 (1904) (State App. K).

4. Other amendments to the 1904 Act were made in the following Acts: Act of March 3, 1905, 33 Stat. 1048, 1080-81; Act of June 21, 1906, 34 Stat. 325, 353-54; Act of May 29, 1908, 35 Stat. 444, 448-50; Act of April 12, 1910, 36 Stat. 296.

The importance of the Rosebud liquor provision was explained as follows:

> As there existed in 1910, an outstanding prohibition against the introduction of intoxicants into "Indian country," see Act of July 23, 1892, 27 Stat. 260, the most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," because not in the Reservation.

Id. at 613 (emphasis added) (footnote omitted). Because the section would have been entirely superfluous if the affected portion of the reservation had not been disestablished, such a provision indicates a clear intent on the part of Congress to disestablish the area involved. Rosebud, supra, at 614.

From the foregoing discussion, it is readily apparent that the 1904 Act, viewed as a whole, was intended to disestablish the original Flathead Reservation.

b. The circumstances surrounding the passage of the Act.

In inquiries of this kind, it is necessary to examine the statute in question in its proper historical setting and in light of the circumstances surrounding its enactment. See Rosebud, supra, at 586, 587; DeCoteau v. District County Court, supra, 420 U.S. at 444, 445. See also Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). It is therefore important to consider the governmental policy respecting Indians which prevailed during the period in which the Flathead Act was passed. At that time, the federal Indian policy consisted of two

principal goals: the assimilation of the Indian population and the reduction of existing Indian reservations. See generally Montana v. United States, 450 U.S. 544, 559 n.9 (1981). As delineated in the Annual Reports of the Secretary of the Interior and the Commissioner of Indian Affairs, the policy of assimilation was to be accomplished primarily through allotment of tribal lands in severalty, education, and the destruction of tribal relations. See, e.g., [1891] Comm'r Indian Affairs Ann. Rep. 3-9, 26. At the same time, it was the policy of the federal government to reduce the amount of existing reservation lands in order to make the surplus lands — that is, the lands not needed by the Indians themselves — available for non-Indian settlement. See, e.g., [1892] Sec'y Interior Ann. Rep. VII-VIII, XXXIII. See also Montana v. United States, supra, at 559 n.9 (1981); Draper v. United States, 164 U.S. 240, 246 (1896); Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 102 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977).

Toward the end of the nineteenth century, the "familiar forces" described in Rosebud, supra, 430 U.S. at 590, and DeCoteau v. District County Court, supra, 420 U.S. at 431, had begun to create pressure for the opening of the surplus lands of the Flathead Reservation. In 1886, provision was made in the annual Indian appropriation act for funds to enable the Secretary of the Interior

> to negotiate with the various bands or tribes of Indians in Northern Montana . . . for a reduction in their respective reservations; or for removal therefrom to other reservations . . . .

Act of May 15, 1886, 24 Stat. 29, 44 (emphasis added). Although there is no record of any negotiations conducted under this Act, there can be little question that by the use of the word "reduction," Congress intended that any reservation lands ceded pursuant to this Act would have been disestablished. See Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 955 (9th Cir. 1982).

In 1896, Congress authorized the Secretary of the Interior to appoint a commission

> to negotiate with the following Indians, namely: With the Crow and Flathead Indians in the State of Montana for the cession of portions of their respective reservations . . . .

Act of June 10, 1896, 29 Stat. 321, 341 (emphasis added). Although duly appointed commissioners conducted negotiations with the Indians on several occasions, no cession of lands was achieved. See, e.g., [1901] Comm'r Indian Affairs Ann. Rep. 49. Again, however, there is no doubt that had an agreement been reached under the 1896 Act, the ceded portion of the reservation would have been disestablished. Namen, supra, at 958. As the Court stated in DeCoteau, supra, language of cession is "precisely suited" to disestablishment. Id. at 445. See also Rosebud, supra, at 589 n.4, 592, 597; Little Light v. Crist, 649 F.2d 682, 685, 689 (9th Cir. 1981) (1904 Act ratifying Crow agreement reached under 1896 Act).

Thus, the 1886 and 1896 Acts reflect an "unmistakable baseline purpose of disestablishment" on the part of Congress. That this purpose was to be carried forward into a subsequent opening of the reservation is indicated by the 1901 negotiations conducted pursuant to the 1896 Act. The commissioners made it clear to the Indians that even if the Tribe did not agree to a cession, Congress would unilaterally open the reservation to non-Indian settlement, and that an agreement was advisable in order to ensure "a better deal." Proceedings of a General Council held with the Indians of the Flathead Reservation, April 3, 1901 at 2 (Tribes' District Ct. Ex. 8). Council with the Flatheads, January 3 and 4, 1901 at 8 (Tribes' District Ct. Ex. 7). No distinction was made between the effect of such a unilateral opening and a bilateral cession.

c. The legislative history of the 1904 Act.

In December, 1903, Representative Dixon of Montana introduced a bill providing for the survey and allotment of the lands, and for the opening of surplus lands not needed for allotment. H.R. 8324, 58th Cong., 2d Sess. (1903). The original version of the bill required the consent of a majority of the male adult Indians, and referred to "the tract herein ceded." Id., §§8, 17. Thus, the legislation is properly viewed as a continuation of earlier Congressional attempts at cession, with the same baseline purpose of disestablishment.

Although the consent provision and the cession language were deleted from subsequent versions of the bill, there is no indication that the underlying purpose of the bill was to have been altered. As the Congressional Committee reported, the final version of the bill was "substantially the same as" the first version. H.R. Rep. No. 1678, 58th Cong., 2d Sess. at 2 (1904) (State App. J); S. Rep. No. 1930, 58th Cong., 2d Sess. at 3 (1904) (State App. K). The consent provision was removed at the suggestion of the Secretary of the Interior, who stated that the bill would "fully safeguard and protect the rights and interests" of the Indians, and that there was "no occasion for presenting the matter to the Indians" for their consent. H.R. Rep. No. 1678, supra at 5; S. Rep. No. 1930, supra at 6. It must be remembered that in 1903, the Supreme Court had ruled that Congress could unilaterally alter reservation boundaries without the consent of the Indians. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The "ceded" wording was also deleted at the suggestion of the Secretary, who objected to the technical misuse of the term. That is, the surplus lands were not actually to be "ceded" to the federal government for resale to settlers, but were to be opened for direct sale to homesteaders, the government acting only as trustee. See, e.g., Rosebud at 596-97. Although the word "ceded" was therefore later deleted, its presence in the original legislation is nevertheless reflective of an intent to disestablish. See Rosebud at 597.

The final revision of the bill, H.R. 12231, was passed by both houses of Congress, with minimal debate, in April 1904. 38 Cong. Rec. 4199-4200, 4992, 5582. Although the legislative history of the bill is somewhat sparse, the absence of any extensive legislative discussion is easily understandable in light of the fact that the Flathead bill was only one of several surplus land bills simultaneously before Congress. As noted above, in one week of April, 1904, four bills were enacted which opened all or parts of the following reservations: the original Flathead Reservation (Act of April 23, 1904, 33 Stat. 302), the Rosebud Reservation in South Dakota (Act of April 23, 1904, 33 Stat. 254), the Devils Lake Reservation in North Dakota (Act of April 27, 1904, 33 Stat. 319), and the Crow Reservation in Montana (Act of April 27, 1904, 33 Stat. 352). All of the four bills provided for the allotment of lands in severalty and the opening and sale of the surplus lands. The only notable difference between the Flathead Act and the others is that the Rosebud, Crow, and Devils Lake Acts were unilateral modifications of preceding cession agreements, while there was no cession agreement preceding the Flathead Act, and the Act simply unilaterally provided for the opening of the Reservation.

The legislative history of these Acts strongly suggests that the Flathead bill was considered to be so similar to the others that separate debate was unnecessary. In the Senate, after extended debate on the Devils Lake bill, it was apparently agreed that all four bills

would be considered together without extended debate.[5] See 38 Cong. Rec. 4984 (1904) (remarks of Sen. Allison); Helena Independent, April 19, 1904, at 1, Col. 2 (Polson District Ct. Ex. 14). Moreover, in regard to the Crow bill, Senator Platt stated:

> This bill is one of four bills which have already passed in the House of Representatives for the opening of reservations . . . . It does not differ substantially from the three bills which we have already passed, and they all ought to go together.

38 Cong. Rec. 5183 (1904) (emphasis added).

In examining the intent of Congress as to the Flathead Act, the purpose of these other contemporaneous Acts must therefore be given considerable weight as part of the legislative context of the Flathead Act. It is virtually inconceivable that without once discussing

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5. The Devils Lake bill was the first to be brought up in the Senate, on April 2, 1904, but met with opposition on the issue of the method of payment for the surplus lands. 38 Cong. Rec. 4138-39. See generally Rosebud at 592-96. The bill was brought up twice more on April 14 and 16, 1904, and met with the same resistance. 38 Cong. Rec. 4674-76, 4914-25. On Monday, April 18, the Rosebud and Devils Lake bills were passed in quick succession without debate. Id. at 4984-88. Senator Gibson of Montana then obtained the floor to introduce the Flathead bill, but was interrupted briefly for the consideration of another bill. Id. at 4988-92. The Senate then passed the Flathead bill, also without debate. Id. at 4993. Finally, the Crow bill was brought up and approved by the Senate two days later on April 20, 1904. Id. at 5182-84.

the point, Congress intended these similar acts, which concerned the same general subject matter and which were considered at the same time, to have profoundly different results. The legislative history discloses no sound basis on which to distinguish the Flathead Act from the Rosebud and Crow Acts, and the intent of Congress with respect to each Act must be considered to have been the same.

This conclusion is bolstered by the legislative history to the 1909 amendment adding the prohibition on intoxicants. The Senate Report relating to the amendatory act stated that the provision "extends to all the lands formerly constituting the reservation the restrictions as to the sale of intoxicants. It is unnecessary to say that this would be very advantageous." S. Rep. No. 1036, 60th Cong., 2d Sess. at 17-18 (1909) (emphasis added). Thus, it is beyond question that Congress included this provision, as it did in the 1910 Rosebud Act, because it believed that the 1904 Act disestablished the Reservation. See Rosebud, supra, at 613-14 n.47.

d. The subsequent jurisdictional history.

In resolving questions of reservation disestablishment, this Court has looked to the jurisdictional history of the original reservation area subsequent to the passage of the statute, as one element of its analysis. See Rosebud, supra at 603-05; DeCoteau, supra at 442-44. There is no dispute that from the opening of the original Reservation at least until 1951, Montana and its political

subdivisions assumed complete jurisdiction over both Indians and non-Indians on non-trust lands within the original reservation boundaries.[6] See Confederated Salish & Kootenai Tribes v. Namen, Civ. No. 2343, at 30-31 (D. Mont. April 8, 1980) (State App. B). As this Court noted in Rosebud, supra, this long-standing assumption of jurisdiction by State and local authorities "demonstrates the parties' understanding of the meaning of the Act," and is entitled to some weight. Id. at 604-05.

The understanding of federal officials regarding the purpose of the 1904 Act is further demonstrated by numerous references to the "former" reservation and the like contained in letters, decisions, and memoranda of the Department of the Interior. See, e.g., Opinion of the Solicitor No. M-11410, I Op. Sol., Indian Affairs 99, 100, 101 (1924); John B. Elie, 48 I.D. 59, 61 (1921); Regulations for Sale of Unsold and Unreserved Lots, 47 I.D. 175 (1919); Villa Site Regulations, 44 I.D. 39, 39 (1915); Frank D. Griffin, 41 I.D. 521, 522 (1913). The understanding of Department of Interior officials is

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6. Criminal jurisdiction was continuously exercised in the area by State authorities until the 1951 Montana Supreme Court decision in State ex rel. Irvine v. District Court, 125 Mont. 398, 239 P.2d 272. Without deciding the question of disestablishment presented by this case, the Court in Irvine held that fee-patented land within the boundaries of the original Reservation was "Indian country" under the revised definition of "Indian country" set forth in 18 U.S.C. § 1151(a).

further revealed by several Orders of Restoration issued by the Secretary of the Interior from 1936 to 1964. 1 Fed. Reg. 666; 3 Fed. Reg. 5; 21 Fed. Reg. 6681; 23 Fed. Reg. 3854; 26 Fed. Reg. 4015; 29 Fed. Reg. 16827. These orders restored certain unsold surplus lands to tribal ownership and to reservation status pursuant to Sections 3 and 7 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 463 and 467. It is therefore clear that the Secretary believed that the surplus lands were not theretofore part of an existing reservation.

It is evident that Congress itself shared this belief that the 1904 Act had disestablished the original Flathead Reservation. For instance, in the Act of July 17, 1914, 38 Stat. 510, Congress extended certain provisions of the general reclamation statutes to the "Flathead Irrigation project, in the former Flathead Indian Reservation." (emphasis added). In addition, in 1920 Congress authorized the State of Montana to select certain lands in lieu of school lands "within the boundaries of the former Flathead Reservation." Act of February 14, 1920, 41 Stat. 408, 421 (emphasis added).

B. The Decision of the Court of Appeals Fails to Apply the Relevant Principles in a Manner Consistent with the Recent Decisions of this Court.

As the above discussion demonstrates, use of the analysis required by this Court and reference to the specific holdings of Rosebud Sioux Tribe v. Kneip and DeCoteau v. District County Court compels a conclusion that the 1904 Flathead Act was intended to disestablish

the original Flathead Reservation. In reaching the opposite conclusion, the Court of Appeals failed to apply the relevant principles in a manner consistent with recent decisions of this Court.

1. The face of the Act.

First, the court below looked to the face of the 1904 Act at issue in this case, and relied heavily on the lack of express language indicating that the Flathead Reservation was to have been disestablished. 665 F.2d at 955-56 (State App. A). This reliance is misplaced, however. As this Court made clear in Rosebud, "the notion that such express language in the Act is the only method by which congressional action may result in disestablishment is quite inconsistent with [the proper inquiry]." 430 U.S. at 588 n.4 (emphasis in original). See also United States v. Wounded Knee, 596 F.2d 790, 794-95 n.7 (8th Cir.), cert. denied, 442 U.S. 921 (1979); Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977). Thus, the presence of express language may be helpful as evidence of congressional intent, but it is certainly not a prerequisite to a finding of disestablishment. This principle is most clearly illustrated by the Court's determination in Rosebud that a 1907 surplus lands act was intended to disestablish the affected reservation area, despite the absence of any express language of disestablishment. 430 U.S. at 606-09.

The Court of Appeals discounted the similarity between the 1904 Flathead Act and the later Rosebud Acts, stating that this Court held that the latter acts diminished the Rosebud Reservation "only because of their perceived relationship to an earlier statute [the 1904 Rosebud Act] that contained explicit language of cession." This, however, misstates the holding of Rosebud. Although there is no doubt that the 1907 and 1910 Rosebud Acts bore a relationship to the 1904 Act, that fact certainly does not compel the conclusion that the cession language in the 1904 Act was the crucial and dispositive factor as to the subsequent Acts. On the contrary, the existence of a preceding cession statute affecting other lands in the Rosebud Reservation simply provided a frame of reference for the Court's examination of the 1907 and 1910 Acts. 430 U.S. at 607-08.

Although it acknowledged the holding in Rosebud regarding the school lands and intoxicants provisions in the Rosebud Acts, the Court of Appeals stated the "the presence of such provisions at best supports a finding reached on other grounds, and is by no means dispositive." 665 F.2d at 956. This dismissal of the school lands and liquor sections in the Flathead Act unduly discounts the detailed treatment given to similar provisions by this Court in Rosebud. See Rosebud at 599-601, 608 n.36, 611-14 and n.47. Far from being simply secondary support, the Rosebud provisions were relied upon by this Court as primary evidence of the purpose of the statutes there in question. As stated in the Rosebud opinion, the

"natural construction" of the school lands provision "is to read a congressional intent to disestablish" in that section. Id. at 601. Similarly, the Court in Rosebud stated that the liquor provision in the 1910 Rosebud Act "reflect[s] strongly" an intent to disestablish. Id. at 614. The virtually identical provisions in the Flathead Act are surely equally clear indications of the same intent.

2. The legislative history.

In its treatment of the legislative history of the 1904 Flathead Act, the Court of Appeals again made much of the absence of cession language, and held that the deletion of cession language in the bill at the suggestion of the Secretary of the Interior "strongly suggests congressional recognition that reservation lands were not being ceded, and hence that reservation status was not being terminated." 665 F.2d at 956. As before, this statement misapprehends the applicable principles as developed by this Court. There is no dispute that the deletion of the words "tract herein ceded" from the bill which would become the Flathead Act reflects an understanding on the part of the Secretary and of Congress that no actual cession of reservation lands was to take place. However, the fact that Congress recognized that the use of the word "ceded" was technically incorrect does not suggest in any way that Congress intended that the reservation was to remain intact. On the contrary, this Court has made it very clear that in 1904 Congress

was fully aware that it could effect a disestablishment by a unilateral act, as well as by way of a bilateral cession agreement. Rosebud at 587-88, 594, 598. The flaw in the argument of the court below is that it depends upon an assumption that the cession of lands is the only manner in which a reservation could be disestablished — an assumption put to rest in Rosebud. As noted above, the legislative history indicates that the revision of the bill was not intended to effect any change in the purpose of the legislation. What is important in this regard is that the legislation was perceived to have the same effect as a cession.

As noted above, the legislative history of the Flathead Act cannot be examined without considering the three other acts, including the 1904 Rosebud Act, which were passed at the same time and which were companion legislation to the Flathead Act. Despite the fact that Congress drew no distinction between the effect and purpose of the four acts, the Court of Appeals found the absence of a pre-existing cession agreement and the lack of cession language in the Flathead Act to be "salient differences". In declining to fully consider the legislative context of the Flathead Act, the Court of Appeals failed to engage in the comprehensive analysis mandated by this Court in Rosebud and DeCoteau.

3. The surrounding circumstances.

In its opinion, the Court of Appeals disputed the City's contention that the federal policy at the time the Flathead Act was passed was to disestablish existing Indian reservations, and discounted the relevance of any such policy. 665 F.2d at 957, 958. However, it is clear that one ultimate object of the prevailing policy of the era was the "gradual extinction of Indian reservations." Montana v. United States, 450 U.S. 544, 559 n.9 (1981). See also discussion, supra at 14-15. Although this does not mean that every piece of legislation of the period necessarily conformed with this policy, existing policy does serve as a useful backdrop against which legislation may be evaluated. As was pointed out in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978), treaties and statutes affecting Indians "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

The Court of Appeals also did not view the 1886 and 1896 cession statutes, and the negotiations conducted between 1897 and 1901, as support for a conclusion of disestablishment. 655 F.2d at 958. Yet these statutes are clear indicia of congressional intent in the years preceding the enactment of the Flathead statute, and there is no reason to assume that this intent changed after negotiations with the Indians failed to achieve the desired result. Instead, the more logical assumption is that there was, as in Rosebud, an "implied continuity of purpose between 1901 and 1904." Id. at 598-99.

4. The subsequent jurisdictional history.

The Court of Appeals attempted to distinguish the jurisdictional history subsequent to the opening of the Flathead Reservation from the history of the original Lake Traverse and Rosebud Reservations discussed by this Court in DeCoteau, supra, 420 U.S. at 442-44, and in Rosebud, supra, 430 U.S. at 603-05. 665 F.2d at 959. While it is true, as the Court of Appeals noted, that the exercise of jurisdiction by the State was interrupted in 1951 by a decision of the Montana Supreme Court, the court below failed to consider two important factors. First, the 1951 decision in State ex rel. Irvine v. District Court, 125 Mont. 398, 239 P.2d 272, involved only the issue of whether townsites within the original boundaries of the Flathead Reservation were subject to State jurisdiction by virtue of the fact that the land was owned by non-Indians, and not the issue of whether the original reservation had been disestablished by the 1904 Act. More importantly, the fact remains that the State exercised unquestioned jurisdiction for approximately forty years following the opening of the reservation in 1910. This long-standing exercise of jurisdiction in the years immediately after the opening ought to be accorded far more weight than more recent developments.

The Court of Appeals acknowledged the numerous legislative and administrative documents which refer to

"the former Flathead Reservation" or otherwise demonstrate a clear perception on the part of federal officials that the reservation had been disestablished. 665 F.2d at 959. However, the court below dismissed this clear evidence of disestablishment on the basis of other documentary references which, claimed the court, "contradict" those adduced by the City. 665 F.2d at 959-60. An examination of these documents shows that they generally refer to "the Flathead Reservation" or similar descriptive phrases, without the use of the past-tense qualifiers such as "former." However, many similar present-tense references can be found in Interior documents relating to the former Lake Traverse Reservation which was found to have been disestablished in DeCoteau, supra. Id. at 442 n.27. Such "present-tense" references are easily explainable as convenient geographical designations of an area, which was once an Indian reservation, and in which there was a continuing federal presence by virtue of the substantial amount of Indian trust land[7] and a significant Indian population. See United States v. Oklahoma Gas & Electric Co., 318 U.S. 206, 216 (1943). This explanation is considerably more satisfactory than the suggestion that the responsible officials, in utter

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7. There is no question that the federal government retained significant responsibility over allotments and unsold surplus lands by virtue of the trust status of the lands. See, e.g., Ash Sheep Co. v. United States, 252 U.S. 159, 164-66 (1920); United States v. Pelican, 232 U.S. 442, 447-50 (1914).

confusion, continually vacillated between opposite perceptions of the status of the area. The use of the word "former" in this context is unambiguous and is susceptible to only one explanation, that is, that the original reservation was officially perceived to have been disestablished by the 1904 Act.

Finally, the Court of Appeals found great significance in the fact that the Presidential Proclamation opening the Flathead Reservation to settlement referred neither to a "cession" nor to the "former" reservation. 665 F.2d at 959. See Proclamation of May 22, 1909, 36 Stat. 2494. This reasoning is puzzling, however, given the absence of any such conclusion in Rosebud regarding substantially similar proclamations. See Presidential Proclamation of August 24, 1908, 35 Stat. 2203; Presidential Proclamation of June 29, 1911, 37 Stat. 1691.

CONCLUSION

From the foregoing discussion, it is clear that the decision of the Court of Appeals was decided in a manner inconsistent with the decisions of this Court, and will therefore serve to undermine the principles stated therein. In addition, the decision below will have far-reaching and lasting effects upon the way in which this part of Montana and its primarily non-Indian population are governed. Most importantly, the decision below illustrates the need for further definition of the principles outlined in the Court's decisions in Rosebud and DeCoteau. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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ACT OF JUNE 21, 1906 (part), 34 STAT. 325, 354-55

FLATHEAD RESERVATION.

That the Act of April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," as amended by section nine of the Act of March third, nineteen hundred and five (Thirty-third Statutes at Large, page one thousand and forty-eight), be amended by adding the following sections:

"Sec. 17. That the Secretary of the Interior is hereby authorized and directed to reserve and set aside for town-site purposes, and to survey, lay out, and plat into town lots, streets, alleys, and parks not less than forty acres of said land at or near each of the present settlements of Arlee, Dayton, Ravalli, Dixon, and Ronan, and not less than eighty acres at the present settlements of Saint Ignatius and Polson, and at such other places as the Secretary of the Interior may deem necessary or convenient for town sites, in such manner as will best subserve the present needs and the reasonable prospective growth of said settlements.

"Such town sites shall be surveyed, appraised, and disposed of as provided in section twenty-three hundred and eighty-one of the United States Revised Statutes: Provided, That any person who, at the date when the

appraisers commence their work upon the land, shall be an actual resident upon any one such lot and the owner of substantial and permanent improvements thereon, and who shall maintain his or her residence and improvements on such lot to the date of his or her application to enter, shall be entitled to enter, at any time prior to the day fixed for the public sale and at the appraised value thereof, such lot and any one additional lot of which he or she may also be in possession and upon which he or she may have substantial and permanent improvements: Provided further, That before making entry of any such lot or lots the applicant shall make proof, to the satisfaction of the register and receiver of the land district in which the land lies, of such residence, possession, and ownership of improvements, under such regulations as to time, notice, manner, and character of proof as may be prescribed by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior: Provided further, That in making their appraisal of the lots so surveyed, it shall be the duty of the appraisers to ascertain the names of the residents upon and occupants of any such lots, the character and extent of the improvements thereon, and the name of the reputed owner thereof, and to report their findings in connection with their report of appraisal, which report of findings shall be taken as prima facie evidence of the facts therein set out. All such lots not so entered prior to the day fixed for the public sale shall be offered at public outcry in their regular order, with the other

unimproved and unoccupied lots. That no lot shall be sold for less than ten dollars: And provided further, That said lots, when surveyed, shall approximate fifty by one hundred and fifty feet in size.

"Sec. 18. That the Secretary of the Interior is hereby authorized and directed to reserve and set aside one hundred and sixty acres of land at and surrounding the present hot springs, situated on said reservation near the settlement of Camas.

"That said hot springs and the said one hundred and sixty acres of land last mentioned shall be under the control and direction of the Secretary of the Interior, under such rules and regulations as he may prescribe, but any and all moneys that shall be derived from such use shall be for the benefit of the persons holding tribal relations with said tribes of Indians, the same to be disbursed as provided in section thirteen of this Act.

"Sec. 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water.

"Sec. 20. That there is hereby appropriated, for the survey, appraisement, and sale of said town sites, out of any money in the Treasury not otherwise appropriated, the sum of fifteen thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out

of the funds arising from the sale of said lands: Provided, That the persons employed or detailed under this appropriation shall be allowed therefrom while on duty a per diem in lieu of subsistence, at a rate to be fixed by the Secretary of the Interior, not exceeding three dollars per day each, and actual necessary expenses for transportation, including necessary sleeping-car fares."

ACT OF MARCH 3, 1909 (part), 35 STAT. 781, 795-96

That the Act of April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," as amended by the Act of June twenty-first, nineteen hundred and six, and the Act of May twenty-ninth, nineteen hundred and eight, be amended by adding thereto the following sections:

"Sec. 21. That the lands allotted, those retained or reserved, and the surplus lands sold or otherwise disposed of shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Indian allottees, whether under the care of an Indian agent or not, shall for a like period be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

"Sec. 22. That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to reserve from location, entry, sale, or other appropriation all lands within said Flathead Indian Reservation chiefly valuable for power sites or reservoir sites, and he shall report to Congress such reservations."

That section eleven of the Act of April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be amended to read as follows:

"Sec. 11. That all merchantable timber on said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior, for cash, under sealed bids or at public auction, as the Secretary of the Interior may determine, and under such regulations as he may prescribe: Provided, That after the sale and removal of the timber such of said lands as are valuable for agricultural purposes shall be sold and disposed of by the Secretary of the Interior in such manner and under such regulations as he may prescribe."

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No. 81-2406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF POLSON, MONTANA,
Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Flathead Indian Reservation was disestablished by the Act of April 23, 1904, ch. 1495, 33 Stat. 302.*

* Respondents will restate and address the "ownership" and "regulatory" issues in a separate Brief in Opposition to the separate Petition for a Writ of Certiorari to the Ninth Circuit filed by the State of Montana and the Namens in No. 82-22 (hereinafter cited as Petition and Namen Petition, respectively).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2406

CITY OF POLSON, MONTANA,
Petitioner,
v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This litigation began in 1973, when the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereinafter "the Tribes"), and the Chairman of the Flathead Tribal Council sued certain non-Indian owners of Reservation land in the United States District Court for the District of Montana, seeking declaratory and injunctive relief against the defendants for trespassing on tribal lands. The district court held, *inter alia*, and the court of appeals agreed, that all lands within the original boundaries of the Flathead Indian Reservation are still part of that Reservation. *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452, 464 (D. Mont. 1974), Appendix to Namen Petition ("App.") at 178, *aff'd*, 534 F.2d 1376 (9th Cir.), App. at 202-05, *cert. denied*, 429 U.S. 929 (1976) ("*Namen I*").

In 1975, the City of Polson, Montana, sued the Tribes, seeking a declaratory judgment that the Flathead Reservation had been disestablished, or terminated, by the Flathead Allotment Act, Act of April 23, 1904, ch. 1495, 33 Stat. 302, App. at 236-43. The State of Montana intervened as a plaintiff in that case. In 1977, the United States filed a separate suit, as the Tribes' trustee, against the City of Polson and the State of Montana, asking for a declaratory judgment that the Flathead Reservation had not been disestablished or diminished by the 1904 Act. Both of those cases were consolidated with the original *Namen* case.

Following exhaustive briefing on the termination issue, on September 20, 1979, Judge Jameson ruled, in a careful and comprehensive memorandum decision, that the Flathead Allotment Act did *not* terminate or diminish the Flathead Reservation. *Confederated Salish and Kootenai Tribes v. Namen*, Civ. No. 2343 (D. Mont. Sept. 20, 1979) (memorandum decision). On April 8, 1980, he issued an opinion affirming that ruling and incorporating a substantial part of the memorandum decision. *Confederated Salish and Kootenai Tribes v. Namen*, Civ. No. 2343 (D. Mont. April 8, 1980), App. at 35-155 (*"Namen II"*). The United States Court of Appeals for the Ninth Circuit affirmed Judge Jameson's decision on the termination issue on January 11, 1982. The court of appeals ruled: "Since neither the Act on its face nor the surrounding circumstances and legislative history make it clear that Congress intended to terminate the Flathead Reservation, we affirm the district court's finding that there has been no such termination." *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 960 (9th Cir. 1982), App. at 2-34, (*"Namen III"*).

The City of Polson ("Polson") has asked this Court to review that decisoin. For the reasons set forth hereinbelow, the Tribes submit that Polson's petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

By the 1855 Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, App. at 206-16, the Tribes reserved for their own exclusive use and benefit certain lands which thereafter came to be known as the Flathead Indian Reservation. 12 Stat. at 975-76, App. at 207-08. The courts below have held and the Tribes contend that the lands within the treaty boundaries of the Flathead Indian Reservation remain as and continue today to constitute the Flathead Indian Reservation. Polson argues that the Flathead Reservation was terminated or "disestablished" by the Act of April 23, 1904. Respondents submit that the language of the 1904 Act, its legislative history, and the circumstances and events surrounding and subsequent to its enactment mandate the conclusion that Congress did *not* terminate, "disestablish" or otherwise diminish the boundaries of the Flathead Reservation.[1]

I. The Ninth Circuit's Ruling on Disestablishment of the Flathead Reservation Is Entirely Consistent with the Decisions of this Court

In support of its Petition, Polson argues that the Ninth Circuit's decision on disestablishment is inconsistent with the controlling decisions of this Court; it suggests that the Court should once again further define the principles governing interpretation of acts opening Indian reservations to non-Indian settlement.

Respondents submit that there is absolutely no need for further guidance from this Court on this issue. This

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[1] It should be noted at the outset that Polson stands alone in challenging this portion of the Ninth Circuit's decision; the State of Montana, apparently agreeing with the lower court ruling, does not ask this Court to review the disestablishment issue.

Namen and the State of Montana state in their petition: "From the decision on the *regulatory and ownership issues*, Namen and the State of Montana petition this Court for a Writ of Certiorari to issue to the United States Court of Appeals for the Ninth Circuit." Namen Petition at 7 (emphasis added).

Court has already—on more than one occasion—articulated clear and precise principles to guide the lower courts in determining whether an Indian reservation has been disestablished or diminished by an act of Congress. It need not do so again.

It is well-settled that the effect of a statute providing for Indian allotments and non-Indian settlement depends on the intent of Congress. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 444, *reh'g denied*, 421 U.S. 939 (1975); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 358-59 (1962).[2] In order to diminish or terminate an Indian reservation, congressional intent to achieve such a result must be "expressed on the face of the Act or be clear from the surrounding circumstances and the legislative history." *Mattz v. Arnett*, *supra*, 412 U.S. at 505.

In the instant case, these controlling legal principles have been applied in a manner entirely consistent with the decisions of this Court. Both the Court of Appeals for the Ninth Circuit (*"Namen III"*) and the District Court for the District of Montana (Judge Jameson) (*"Namen II"*) conducted a careful and extensive analysis of the evidence presented by the parties in light of these principles, and concluded that the Flathead Allotment Act did *not* terminate or diminish the Flathead Reservation.

The evidence supporting this ruling is substantial and compelling. First, as the court of appeals noted in *Namen III*, the face of the Flathead Allotment Act does not express an intent to terminate the Reservation.

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[2] As the Court stated in the *Rosebud Sioux* case, "in all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history' are to be examined with an eye toward determining what congressional intent was." *Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 587 (quoting *Mattz v. Arnett*, *supra*, 412 U.S. at 505). *See also DeCoteau v. District County Court*, *supra*, 420 U.S. at 444.

Namen III, *supra*, 665 F.2d at 955-56, App. at 11. The language of the Act, providing only for the survey and allotment of Reservation lands, for the sale and disposal of surplus allotted lands, and for the opening of such surplus lands to settlement and entry, closely parallels the language found by this Court in *Seymour*, *not* to have altered reservation boundaries. *Seymour v. Superintendent*, *supra*, 368 U.S. at 355. The Act contains no language—such as the cession language in the 1904 Act at issue in *Rosebud Sioux*,[3]—"precisely suited" to disestablishment. *See Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 597. The presence or absence of such "precise" language is a key indicator of congressional intent to extinguish or diminish a reservation.

Second, and equally important, is the absence of any cession agreement between the Flathead Indians and the United States government. In 1896, Congress authorized the appointment of a commission to negotiate with the Confederated and other Tribes for cessions of portions of their respective Reservations.[4] The record in this case reveals that the commission's attempts to obtain such an agreement were consistently and unequivocally rebuffed by the Indians, and the commission ended its futile efforts in 1901. *See Namen III*, *supra*, 665 F.2d at 957, App. at 14-15; *Namen II*, *supra*, slip op. at 16-19, App. at 54-58. This is in sharp contrast to *Rosebud Sioux*, where the 1904 statute diminishing that Reservation expressly incorporated and ratified a 1901 cession agreement with the Tribe, and is consistent with this Court's emphasis on the presence of a cession agreement as a prerequisite to a finding of diminishment. *See Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 591-92.

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[3] The Act of April 23, 1904, ch. 1484, 33 Stat. 254, 256, states that "The said Indians . . . do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to . . . Gregory County."

[4] Act of June 10, 1896, ch. 398, 29 Stat. 321, 341-42.

Other important factors further reinforce the lower courts' conclusion. For example, one of the sections in the first version of the Flathead Allotment Act referred to the "tract herein ceded," but Congress changed this language to "in the tract under consideration"; it did so expressly because the Tribes had not agreed to a cession and none was contemplated. *Namen III*, *supra*, 665 F.2d at 956, App. at 14. As the court of appeals noted, "the change strongly suggests congressional recognition that reservation lands were not being ceded, and hence the reservation status was not being terminated." *Id.* Furthermore, the presidential proclamation that formally announced the Reservation opening to non-Indian settlement contains no mention of cession or "former Reservation." The court of appeals correctly found that this is in direct contrast to the proclamation in *Rosebud Sioux*, which contained strong cession language and which was viewed by this Court as "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment of Gregory County." *Namen III*, *supra*, 665 F.2d at 959, App. at 20 (*quoting Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 602-03).[5] And, finally, unlike the situations in *Rosebud Sioux* and *DeCoteau*, there has not been a continuous unchallenged assumption of state jurisdiction over the lands in question on the Flathead Reservation.[6] The court of appeals

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[5] Polson claims that the significance attributed by the Court to the proclamation is "puzzling . . . given the absence of any such conclusion in *Rosebud* regarding substantially similar proclamations." Petition, p. 30. Actually, it is Polson's reasoning that is puzzling; clearly it is the *difference* between these proclamations—the strong cession language in the Rosebud Sioux proclamation, and the absence of such language in the Flathead proclamation—that *is* significant.

[6] Polson incorrectly asserts (Petition, pp. 20-21) that all parties agree that, from the Reservation's opening until 1951, Montana and its political subdivisions assumed "complete jurisdiction over both Indians and non-Indians on non-trust lands within the original reservation boundaries." Instead, the Tribes admitted only that the

emphasized that federal and State courts consistently have ruled that the Flathead Reservation extends to its original 1855 boundaries.[7]

In contending that the ruling of the court of appeals is inconsistent with this Court's prior decisions, Polson highlights two isolated facts—section 8 in the Flathead Allotment Act, granting two sections out of every township to Montana for school purposes, and section 21, a 1909 amendment,[8] extending the federal ban on liquor in Indian country to surplus lands in the Reservation—which are similar to provisions that this Court said supported a finding of intent to diminish the Rosebud Sioux Reservation. Both the court of appeals and the district court considered these and other arguments, but properly found that they were far outweighed by more numerous and much more significant indicia that Congress did *not* intend in 1904 to extinguish the Flathead Reservation.

II. The Decision of the Court of Appeals On Disestablishment Is *Sui Generis* and Is of Local, Not National, Importance

The only real issue Polson raises in its Petition turns on the particular facts of this case and this case alone.

State had assumed limited jurisdiction over non-Indians and "*citizen Indians*," that is, Indians who had obtained fee patents to their allotments. *Namen II*, *supra*, slip op. at 30-31, App. at 72-74. The Tribes, at least since 1934, have asserted jurisdiction over *all* lands, including fee lands, within the original exterior boundaries of the Flathead Reservation. *See Namen II*, *supra*, at 31-32, App. at 75-76.

[7] In 1951, the Montana Supreme Court ruled in *State ex rel. Irvine v. District Court*, 239 P.2d 272 (Mont. 1951), that the State had no jurisdiction over major crimes on the Flathead Reservation, and in 1973 it held in *Security State Bank v. Pierre*, 511 P.2d 325, 328-30 (Mont. 1973), that Montana had no jurisdiction over a civil dispute between an Indian and a non-Indian at Polson, Montana, located within the exterior boundaries of the Reservation. *See Namen III*, *supra*, 665 F.2d at 959, App. at 19.

[8] Act of March 3, 1909, ch. 263, 35 Stat. 781, 795.

Indeed, it is inherent in the disestablishment issue that each case must be decided on the basis of unique treaties, statutes, and historical facts. *See DeCoteau v. District County Court, supra,* 420 U.S. at 447; *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 and n.8 (1973); *United States v. Dupris,* 612 F.2d 319, 321 (8th Cir. 1979), *vacated and remanded,* 446 U.S. 980 (1980); *United States ex rel. Cook v. Parkinson,* 525 F.2d 120, 123 (8th Cir. 1975), *cert. denied,* 430 U.S. 982 (1977); *United States ex rel. Condon v. Erickson,* 478 F.2d 684, 689 (8th Cir. 1973). In essence, Polson asks the Court to make a third review of the lengthy and complex record to look for what two courts, after careful and comprehensive study, have been unable to find—unequivocal evidence of a congressional intent to extinguish the Flathead Reservation. Such evidence simply does not exist.

Perhaps most importantly, resolution of the disestablishment issue herein is of interest only to the parties before this Court. It has no national significance. No new issues are presented; no new law has been proclaimed—there has been only a careful application by two federal courts of established Supreme Court principles to one Indian Reservation. Certiorari, therefore, should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF POLSON, MONTANA, PETITIONER

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL.

JAMES M. NAMEN, ET AL. AND STATE OF MONTANA, PETITIONERS

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL. AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Flathead Indian Reservation was disestablished by the Act of Apr. 23, 1904, ch. 1495, 33 Stat. 302.

2. Whether the Tribes are the beneficial owners of the bed of the south half of Flathead Lake within their Reservation.

3. Whether the Tribes are the beneficial owners of the banks of the south half of Flathead Lake, between high and low water mark.

4. Whether the Tribes have the authority to regulate the exercise of the riparian rights of access and wharfage by non-Indian owners of land along the south half of Flathead Lake.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2406

CITY OF POLSON, MONTANA, PETITIONER

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL.

No. 82-22

JAMES M. NAMEN, ET AL. AND STATE OF MONTANA PETITIONERS

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CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, ET AL. AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-33)[1] is reported at 665 F.2d 951. The opinion of the district court (Pet. App. 35-155) is unreported. Earlier opinions of the court of appeals (Pet. App. 202-205) and district court (Pet. App. 167-201) in this case are reported at 534 F.2d 1376 and 380 F. Supp. 452, respectively. A petition for certiorari seeking review of the earlier judgment of the court of appeals was denied at 429 U.S. 929 (1976).

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1982. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 10, 1982 (Pet. App. 34). By order dated May 25, 1982, Justice Rehnquist granted an extension of time to July 1, 1982, for the filing of the petitions for certiorari. Both the petition in No. 81-2406 and the petition in No. 82-22 were filed on July 1, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND TREATIES INVOLVED

The federal statutes and treaties involved are set forth in the appendix to the petition in No. 82-22 (Pet. App. 206-216, 217-225, 236-243). The Tribe's Shoreline Protection Ordinance, Ordinance 64A, is set forth at Pet. App. 272-285.

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[1] No appendix was filed with the petition in No. 81-2406. See Pet. 1. Accordingly, all "Pet. App." references herein refer to the appendix to the petition for certiorari in No. 82-22.

STATEMENT

This case arises out of the efforts of the Confederated Salish and Kootenai Tribes to exercise governmental authority to protect the shoreline of Flathead Lake within their Reservation. In its present posture, the case specifically involves the question whether the Tribes have the power to enforce their Shoreline Protection Ordinance [2] against non-Indian owners of fee lands riparian to Flathead Lake.

1. The Tribes are a confederation of American Indian Tribes organized under the Indian Reorganization Act of 1934, ch. 216, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, with a governing body recognized by the Secretary of the Interior. They occupy the Flathead Indian Reservation, created pursuant to the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (Pet. App. 206-216).

Flathead Lake is a navigable body of water approximately 26 miles long and up to 5 miles wide (Pet. App. 6). The Treaty of Hell Gate defines the northern boundary of the Reservation to bisect Flathead Lake (*id.* at 208), placing its south half within the Flathead Reservation. Most of the lands riparian to the lake's south half are now owned by non-Indians (*id.* at 110). As of October 1973, there were 1,407 non-tribal docks and/or breakwaters along that portion of the lake (*id.* at 123).

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[2] Adopted in 1977 with the approval of the Secretary of the Interior, the ordinance (Pet. App. 272-285) regulates shoreline activities—specifically, landfills and dredging, and the building of new, and maintenance of existing wharves, docks, etc.—below the high water mark.

Because the district court held that the Tribes lacked the power to accomplish such regulation (*id.* at 88-111, 153), and because the court of appeals has recalled its mandate reversing that determination (see page 8, *infra*), the tribal ordinance has yet to become effective.

2. This litigation began in August 1973, with an action brought by the Tribes against the Namens, successors in interest to an Indian allottee who had obtained a patent in fee to a lakeside property from the United States, pursuant to the Act of Apr. 23, 1904, ch. 1495, 33 Stat. 302 (Flathead Allotment Act) (Pet. App. 6-7). In connection with a marina business, the Namens and their predecessors had built piers, wharves, and other structures which extended into Flathead Lake well beyond the high water mark (*id.* at 7). The Tribes sought a declaratory judgment that these structures were in trespass upon tribal property, and injunctive relief requiring the removal of the structures and restoration of the lake bed below the high water mark (*ibid*). The City of Polson, Montana, also a riparian landowner, intervened as a defendant.

The Namens and the City of Polson asserted in defense that (1) the federal patents conveyed title to the low water mark under allegedly controlling state law; (2) if they lacked title to the low-water mark, they nevertheless had riparian rights of access and wharfage under federal common law; and (3) the structures in question were a proper exercise of their riparian rights. In August 1974, the district granted partial summary judgment for defendants, holding that they did possess the riparian right of wharfage and access to navigable waters, but reserved judgment as to whether existing structures abused those rights (Pet. App. 199-201). However, the court rejected defendants' argument that they held any title below the high-water mark, concluding (*id.* at 179) that the United States retained title to the bed and banks of Flathead Lake as trustee for the Tribes. *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont. 1974) (*"Namen I"*). On appeal

by the Tribes under 28 U.S.C. 1292(a)(1), the court of appeals affirmed (Pet. App. 202-205), adopting the opinion of the district court as its own. 534 F.2d 1376 (1976). The Tribes' petition for certiorari was denied. 429 U.S. 929 (1976).

3. In November 1975, the City of Polson sued the Tribes, seeking a declaratory judgment that the reservation had been disestablished and diminished, at least to the extent of its allotment and alienation in fee to non-Indians following enactment of the Flathead Allotment Act (Pet. App. 8). The State of Montana intervened as a plaintiff in the City's action, which was consolidated with that brought by the Tribes (*ibid.*).

In July 1977, the Tribes enacted their Shoreline Protection Ordinance, which was approved by the Secretary of the Interior.[3] In September 1977, the Tribes amended their complaint in *Namen I* to allege further that the structures below high water mark violated Ordinance 64A, interfered with navigation and the Tribes' fishing rights, and degraded the water quality of the lake. The United States intervened as plaintiff in the Tribes' suit (Pet. App. 8).

In December 1977, the United States filed a separate complaint praying for a declaration that (1) the Flathead Reservation had not been disestablished or diminished to any extent by the Flathead Allotment Act of 1904; and (2) the Tribes have authority to regulate the use of the bed and banks of Flathead Lake within the Reservation. The case was consolidated with those of the Tribes and City of Polson (Pet. App. 8).

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[3] The Tribe's constitution requires that "any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior." Art. VI, Sec. 1(n). See Pet. App. 106.

The consolidated cases were submitted for decision on documentary evidence, affidavits, and the briefs of the parties, without live testimony. The district court adhered to its conclusions in *Namen I*, including its holding that the United States holds the bed and banks of the south half of Flathead Lake below high water mark in trust for the Tribes (Pet. App. 44-45, 52, 153-154). In addition, the court held, favorably to the Tribes and United States, that "there has been no disestablishment or diminishment of the Flathead Indian Reservation" (*id.* at 54, 82-83, 153). Nevertheless, the court concluded, the end result of various allotment acts—transfer of land to non-Indian ownership—"implicitly divested the Tribes of the power to impose tribal land use regulations upon both the land transferred to non-Indian ownership and the federal common law rights of access and wharfage that were 'annexed' to that land" (*id.* at 98-99).

On uncontradicted evidence, the court found further that the piers, wharves, and other structures were reasonable exercises of the riparian rights of access and wharfage and did not impermissibly interfere with navigation or Indian fishing rights (*id.* at 149-150). The court dismissed the counts in the complaints directed against such structures, subject to the power of the United States to regulate them under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, and Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.* (Pet. App. 154.)

4. All parties appealed. On the issue of the Reservation's termination by opening it to non-Indian settlement, the court of appeals applied the settled principles enunciated by this Court (Pet. App. 9-10) and found—in the language of the relevant legislative acts (*id.* at 10-13), the surrounding circumstances and legislative history (*id.* at 14-19), and in the sub-

sequent legislative, executive, and judicial treatment of the Reservation, both state and federal (*id.* at 18-22)—no clear indication of congressional intent to terminate or reduce it from its original boundaries (*id.* at 10, 22). The court of appeals therefore affirmed (*id.* at 9, 22) the judgment of the district court that the Flathead Reservation had not been disestablished or diminished.

The court of appeals also approved the ruling that the United States holds title to the bed and banks of Flathead Lake within the Reservation in trust for the Tribes (Pet. App. 28). The court of appeals noted (*id.* at 23) that it had settled the question some forty years ago in *Montana Power Co.* v. *Rochester*, 127 F.2d 189, 191 (9th Cir. 1942), and that its holding is "strongly supported by *stare decisis*" (Pet. App. 23), especially in light of the fact that the development and production of hydroelectric power on the Flathead Reservation has proceeded on the premise that the Tribes own the beneficial interest in the south half of Flathead Lake (*id.* at 23-24 and n.26). The court of appeals held that this Court's recent decision in *Montana* v. *United States*, 450 U.S. 544 (1981), did not require a different result here, because (1) the Treaty of Hell Gate expressly divided the lake in two, placing the south half within the Reservation (Pet. App. 26), and (2) there existed a "public exigency" supporting federal retention of the bed and banks in order to bring several Tribes—one dependent on fishing—together on a single Reservation sufficient to their needs (*id.* at 27-28).

Finally, the court of appeals held "that the Tribes have the authority to apply Ordinance 64A to regulate the riparian rights of non-Indians owning land within the Flathead Reservation" (*id.* at 33), and reversed the district court's judgment that the Tribes have

been "implicitly divested" of any such regulatory power over non-Indians (*id.* at 98-99). Because the Tribe's Shoreline Protection Ordinance "seek[s] to regulate non-Indians' use of tribal trust land" (*id.* at 32)—*i.e.*, the bed and banks of Flathead Lake within the Reservation—the court of appeals rejected the implicit divestiture rubric applied by the district court prior to this Court's decisions in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980), and *Montana* v. *United States*, *supra*, 450 U.S. at 557, 563-567.

By order of June 21, 1982, the court of appeals recalled its mandate "pending filing of a petition for certiorari on or before July 1, 1982." Implementation of the tribal ordinance is therefore effectively stayed pending action by this Court on these petitions. See page 3, note 2, *supra*.

ARGUMENT

The ruling of the court of appeals is correct and does not conflict with the decision of any other Circuit, or with any precedent of this Court. The issues resolved, moreover, turn on the special history of a single Indian Reservation and present no question of general importance requiring this Court's intervention. Under traditional standards, therefore, certiorari should be denied.

But, in this instance, there are additional reasons for the Court to withhold its writ. All but one of the questions now tendered have been settled by final judgments previously entered, in some cases by both State and federal courts several decades ago, reaffirmed several times since. Even if, because different parties have taken up the challenge, the doctrines of res judicata and estoppel do not erect an absolute bar to relitigation, we submit this Court properly may de-

cline to reconsider what ought, by now, to be viewed as settled rules of property law, more than sufficiently tested and re-examined by a large number of judges, always with the same result.

And, finally, petitioners have a questionable stake in the remaining issue—the authority of the Tribes to regulate structures jutting into Flathead Lake. Indeed, each of the petitioners is effectively assured of a "grandfather" exemption from the charges and potential restrictions which the tribal ordinance otherwise authorizes. It may be doubted whether the Court need intercede to answer what is, for petitioners, largely an academic question, except only for injured pride.

1. We notice first the "termination", "disestablishment" or "diminishment" issue, rehearsed at length in the petition filed by the City of Polson (No. 81-2406).[4] So far as the status of the Flathead Reservation was ever in doubt, the question has been thought quieted, at least since 1942, when the court of appeals decided *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942), Pet. App. 156, which described the alienated fee lands bordering Flathead Lake as remaining within the Reservation. *Id.* at 158, 161-166. The specific point was confirmed by the

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[4] We are not entirely clear about the City's contention. Apparently, the argument is that the Flathead Reservation was wholly terminated or disestablished in 1904, but "recreated," in part, by "restoration" of unalienated lands under the Indian Reorganization Act after 1934. See 81-2406 Pet. 5-7, 20-22. Other objections aside, however, that theory is inconsistent with this Court's observations in *Clairmont* v. *United States*, 225 U.S. 551, 553 (1912), and *Pronovost* v. *United States*, 232 U.S. 487, 489 (1914), expressly recognizing the continuing existence of the Flathead Reservation, whatever its boundaries, as of 1911.

Montana Supreme Court in 1951, *State ex rel. Irvine* v. *District Court*, 125 Mont. 398, 239 P.2d 272, and, again, in 1973, *Security State Bank* v. *Pierre*, 162 Mont. 298, 511 P.2d 325. See, also, *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954); *State ex rel. McDonald* v. *District Court*, 159 Mont. 156, 496 P.2d 78 (1972) (in which State criminal jurisdiction was premised on a cession under Public Law 280, not disestablishment of the Reservation), and *McCrea* v. *Busch*, 164 Mont. 442, 524 P.2d 781 (1974). The undiminished status of the Flathead Reservation has been the premise of several decisions by the United States District Court for the District of Montana, *e.g.*, *United States* v. *Pollmann*, 364 F. Supp. 995, 998-999 (1973); *Confederated Salish and Kootenai Tribes, Montana* v. *Moe*, 392 F. Supp. 1297, 1312-1313, 1316-1317 (1975), aff'd, 425 U.S. 463 (1976), and, indeed, has apparently been accepted by this Court in *Moe*. See 425 U.S. at 466-467, 478-479. In *Namen I*, involving all the present petitioners except the State of Montana, it was expressly held by the district court in 1974 (Pet. App. 167, 178), in an opinion adopted as its own by the court of appeals (*id.* at 202, 205), that the Flathead Reservation retains its original boundaries, including the riparian lands here at issue. With singular indulgence, the courts below nevertheless re-examined the issue afresh, and, after full consideration, re-affirmed the earlier rulings. *Id.* at 35, 44-45, 52-83 (D. Mont.); *id.* at 2, 9-22 (9th Cir.).

In these circumstances, it is extraordinary to ask this Court to intervene. More than forty years of litigation, during which every judge has reached the same conclusion, should be deemed more than enough judicial process on an issue of purely local importance.

To be sure, it is suggested that intervening decisions by this Court in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)), have changed the ground rules. But the Court has not purported to announce any new principle. On the contrary, *Mattz* v. *Arnett*, 412 U.S. 481 (1973), has been re-affirmed (see 420 U.S. at 449; 430 U.S. at 585, 586-587, 588 n.4, 592, 615), and the only question here is whether the legislation "opening up" the Flathead Reservation should be construed—unlike the similar provision considered in *Mattz*—as revealing the same congressional intent to disestablish, or diminish, the Reservation, as was found to be the case for the Lake Traverse and Rosebud Sioux Reservations. That issue was fully addressed in the decisions below and the differences are sufficiently articulated in those opinions. See Pet. App. 52-83, 9-22. We submit there is no occasion for this Court to re-examine the matter once again.

2. The same comments are appropriate in respect of the issue of title to the bed of the south half of Flathead Lake. That question, also, has been repeatedly litigated and consistently resolved in favor of the Tribes. The point was decided after full consideration in the *Montana Power Co.* case, *supra*, in 1942 (Pet. App. 161-166), and was the predicate for a series of decisions by the Court of Claims (*e.g.*, *Confederated Salish and Kootenai Tribes* v. *United States*, 173 Ct. Cls. 398, 399-403 (1965); *id.*, 437 F.2d 458, 473 (1971)) and by the District of Columbia Circuit (*e.g.*, *Montana Power Co.* v. *Federal Power Commission*, 445 F.2d 739, 742 n.1, 751 (1970), cert. denied, 400 U.S. 1013 (1971); *id.*, 459 F.2d 863, 865, 871-872, cert. denied, 408 U.S. 930 (1972)). The tribal interest in the lake bed was expressly re-affirmed in

Pollmann, *supra* (364 F. Supp. at 999), in *Namen I* (Pet. App. 177, 178-179), and, once again, by both courts below (*id.* at 45-52, 23-28).

Here, also, the pretext invoked for relitigating a point so firmly established by previous judgments is a recent decision of this Court, in this instance *Montana* v. *United States*, 450 U.S. 544 (1981). But, once again, the Court was not purporting to announce new principles. The prevailing opinion in *Montana* merely applies the rule of *United States* v. *Holt Bank*, 270 U.S. 49 (1926), to the particular history of the Crow Reservation and the Big Horn River. See 450 U.S. at 552-557. As the court below explained (Pet. App. 25-28), the present case is obviously distinguishable. Here, unlike the situation in *Montana*, the relevant treaty expressly mentioned and included the water body in dispute and the heavy dependence of at least one of the affected Tribes on fishing fully justified inclusion of a portion of Flathead Lake within the Reservation.

In sum, there has been no departure from the controlling principles and the decision below can safely be left undisturbed. This Court has sufficient burdens without undertaking re-examination of long settled local property disputes that have been resolved with full respect for all binding precedents.

3. The issue relating to ownership of the banks of Flathead Lake within the Reservation—the area between high and low water mark—is equally a matter settled forty years ago, and since re-affirmed. The point was fully considered and resolved in *Montana Power* (Pet. App. 162-166), and has been re-affirmed in *Pollmann*, *supra*, 364 F. Supp. at 999, in *Namen I* (Pet. App. 179 and n.7), and, again, by both courts below in the present case. *Id.* at 50-52, 23.

In this instance, petitioners rely on *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), as requiring a re-assessment of the prior rulings confirming tribal ownership of the Lake banks. Assuming the United States holds the bed proper, it is suggested that the shoreward boundary of that ownership, although governed by federal law, ought to be resolved by borrowing the State law rule. But *Wilson* suggests no such result. That decision dealt with lands at the edge of an Indian Reservation and the effect of geographical changes in the course of the boundary river, not an area still within the Reservation which nature has not altered.

It goes without saying that if the Treaty of Hell Gate confirmed to the Tribes the bed of the south half of Flathead Lake, as well as the uplands to the south, it did not exclude the intervening banks. And it is equally absurd to suggest that, in 1889 when Montana was admitted to the Union, the United States retained the bed but released the banks to the new State. Just as, under the Equal Footing Doctrine, the State takes both bed and banks to high water mark (see *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 375, 376 (1977)), so both bed and banks must be deemed included when the United States withholds the usual grant to the State by a previous reservation in favor of Indian Tribes. See *Montana* v. *United States*, *supra*, 450 U.S. at 569 n.1 (Blackmun, J., dissenting).

Finally, it is clear that, after entering the Union, Montana could not unilaterally alter that situation by enacting general or special laws in favor of riparian owners, granting to them a portion of the lands retained by the United States for the benefit of the Tribes. Recognizing the obstacle, petitioners therefore assert that the United States itself accomplished this

result when it granted patents to lakefront lots. But there is no basis for so concluding.

Whether the federal patents conveying riparian parcels stopped at the high water mark is a pure question of federal law. See *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 376-377; *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935). And, in the absence of any contrary indication in the instrument, the presumption is that such patents grant no more in the case of navigable waterways—if only to avoid encroachment on what is usually the State's title to the bed and banks of the water body. See Pet. App. 166. There is no justification for fashioning a different rule when including the banks would encroach on the like interest of Indian Tribes—especially where, as here, the bed and banks were reserved to the Indians because of their special need for the fishery.

What is more, importing State law would create intolerable confusion. Any allotments made under the General Allotment of 1887, before Montana became a State in 1889 or before it adopted its present "low water" rule in 1895 (see Pet. 14 n.20), would presumably exclude the banks.[8] So, also, we suppose, "surplus" lots along the Lake that were never alienated would reach only to high water mark. On the other hand, later issued patents would include the banks. Thus, neighboring parcels would enjoy differing riparian rights in a checkerboard pattern that

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[8] Indeed, before 1895, there was no arguable basis for construing federal grants of riparian lands in Montana as including the banks of a navigable waterway. And, of course, later enacted State law could not add to the grant at the expense of retained federal lands. It may be, in this instance, that all allotments occurred after 1895. But the result ought not turn on the date of actual allotment or the date when the State first adopted a low water rule.

only a title search could sort out. That is obviously a result to be avoided, if possible. It would create a scheme much more complex than the relatively straightforward distinction between a single regime governing all riparian acreage within the Reservation and another for the North half of Flathead Lake. In sum, this is an instance where federal policy to preserve tribal property undiminished combines with practical considerations to reject borrowing State law property rules within the boundaries of the Indian Reservation. Cf. *California, ex rel. Lands Commission* v. *United States*, No. 89, Orig. (June 18, 1982), slip op. 5-11.

4. We finally reach the only arguably open question, the so-called "regulatory issue." Presumably, petitioners have sought to relitigate the long-settled holdings concerning the status of the Reservation and the ownership of the bed and banks of Flathead Lake because of their bearing on the real point of controversy: whether, and to what extent, the Tribes may regulate the exercise of "riparian rights" by non-Indian owners of lakefront lots. Indeed, if we accept what has long been decided, there is little substance to petitioners' claim to total exemption from tribal regulation.

For our part, we begin with *Namen I*, in which both courts below held that, although the bed and banks of the Lake continue to be held by the United States in trust for the Tribes and the Flathead Reservation retains its original boundaries, nevertheless, fee owners of littoral lots enjoy a federal law right of access to the Lake, including the right to "wharf out" to navigable water. See Pet. App. 187-201, 203-205. That ruling was debatable, since no comparable federal patent, even though issued before statehood, would be construed as granting such an indefeasable right if

the State, upon acquiring the bed and banks of the navigable water body, chose to curb it or annul it. See *Shively* v. *Bowlby*, 152 U.S. 1, 36-47, 48-56, 57-58 (1894). Also see *United States* v. *River Rouge Co.*, 269 U.S. 411, 418-419 (1926).[6] No doubt, the courts below were influenced by the legitimate expectations of the purchasers, encouraged by Congress at the outset and acquiesced in by the Tribes and the United States for half a century thereafter, that they would enjoy such riparian rights. See Pet. App. 183-187, 200, 204-205. But, whatever the correctness of that ruling, we no longer challenge it.[7]

What is more, in the present case the district court reviewed the particular structures in suit that extend below high water mark—those belonging to the present petitioners—and concluded that none of them constitutes an abuse of the owner's riparian rights. Pet. App. 125-150. That determination was not actively contested on appeal (see Pet. App. 9 n.2) and was not disturbed by the court of appeals. Since neither the United States nor the Tribes have cross-petitioned, the ruling is presumably final. Accord-

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[6] Indeed, the petitioners asserted in the district court that their riparian rights were subject to state and local regulation (Pet. App. 89 n.60). And they have never objected to the district court's holding that such riparian activities are subject to the federal regulatory jurisdiction exercised by the Corps of Engineers. See Pet. 4 n.2.

Petitioners do not, therefore, contend that their rights of access and wharfage are absolute, but only that one government entity—the Tribe—lacks all authority to regulate their exercise.

[7] In 1976, the Tribes sought review here of that holding, and the United States supported their petition for certiorari. See Memorandum for the United States as Amicus Curiae in No. 76-185. But the Court denied certiorari. 429 U.S. 929 (1976).

ingly, so far as the present parties are concerned, their "vested rights" are protected and the issue of the Tribes regulatory authority has little, if any, practical effect.[8] This alone is a sufficient basis for this Court to decline to intervene.

At all events, however, there is no ground for faulting the ruling of the court of appeals vindicating a limited authority in the Tribes to regulate the exercise of riparian rights in the southerly part of Flathead Lake. We are dealing with activities occurring *on tribal trust lands*—the bed and banks of the Lake—*within an Indian reservation*, which effectively appropriate tribal property and potentially affect a lake and its fishery purposely embraced within Reservation boundaries. In these circumstances, it is very difficult to appreciate why the Tribes, with the express concurrence of the Secretary of the Interior, ought not be entitled to assert a modest jurisdiction.

It is unnecessary, at this date, to establish that the residual sovereignty of Indian Tribes is *not* limited to self-regulation of "internal" tribal affairs, but embraces a territorial jurisdiction over at least some activities of non-members within Reservation boundaries. That proposition, first authoritatively declared in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.)

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[8] The district court concluded (Pet. App. 150) that the specific structures at issue here

> are permissible, do not unreasonably interfere with tribal navigation, fishing, or boating, and do not result in degrading the waters of Flathead Lake.

That ultimate finding would seem to place them within the class of "existing" structures for which permits "shall" be issued under Section 5 of Ordinance 64A, without application fee or annual charge of any sort. See Pet. App. at 278-280.

515, 557 (1832), and re-affirmed at the turn of the Century in *Morris* v. *Hitchcock*, 194 U.S. 384, 392-393 (1904), was confirmed in modern times by *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), and has been consistently re-iterated. See, *e.g.*, *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 690-692 (1965); *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 426-427 (1971); *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170 and n.6, 174-175, 179 (1973); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65-66 (1978); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, No. 80-11 (Jan. 25, 1982), slip op. 7-18. To be sure, some limitations have been announced. *E.g.*, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana* v. *United States*, *supra*, 450 U.S. at 563-565. But the exceptions have not been allowed to swallow the rule. As the Court wrote in *Colville*, 447 U.S. at 152, and reaffirmed most recently in *Montana*, 450 U.S. at 565-566, and *Jicarilla*, slip op. 7-18, Indian Tribes retain "a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." See, also *Ramah Navajo School Board* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982), slip op. 4-5.

It may well be that, in due course, the Court will be required to mark out more precisely the scope of tribal regulatory authority within Reservations. But, we submit, the present case does not call for such re-

finements. The decision below more than generously accommodates the claims of the State, its municipalities and non-Indian citizens who acquired Reservation lands on Flathead Lake. The residual prerogative of the Tribes to impose reasonable charges and restrictions must be conceded, at least as to the placement of new structures along the lakeshore (see note 8, *supra*). To rule otherwise would substantially devalue the Tribes' beneficial ownership of the bed and banks of Lake Flathead, denigrate their interest in preserving the appurtenant tribal fishery, and deny the Tribes' governmental authority to regulate commercial and public activities within their territory for the common welfare. No new ground is broken here. The ruling of the court of appeals rests comfortably within bounds already well established and does not warrant further review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1982

No. 81-2406

CITY OF POLSON, MONTANA,
Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

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ARGUMENT

In their Briefs in Opposition, both the United States and the Confederated Salish and Kootenai Tribes argue that the Petition for a Writ of Certiorari ought to be denied because it presents no issues of general or national significance. United States Brief in Opposition (hereinafter "U.S. Brief") at 8, 10; Tribes' Brief in Opposition (hereinafter "Tribes' Brief") at 7-8. This assertion, however, is belied by the fact that three states and a number of counties in several western states have submitted an amicus brief in support of the Petition. Brief of Lake County, Montana, et al. As pointed out in that amicus Brief, as well as in the Petition, this case not only concerns the status of the specific area in question but presents the general problem of defining the proper approach to questions of this type and the need for direction from this Court.

It is certainly true, as the Tribes state, that each case involving the question of reservation disestablishment must be decided on the basis of the statutes and historical circumstances peculiar to that case. Tribes' Brief at 8. However, it is equally true that most of the statutes at issue in such cases were enacted during the same historical period and embody the same administrative policy. Indeed, many share the same provisions and otherwise bear substantial similarities to one another. To say that questions concerning the effect of these statutes must be examined separately is surely not to

say that they must be viewed in an historical vacuum, isolated from one another and from their common circumstances. To the contrary, the establishment of general principles to guide the courts in their interpretations of such statutes is not only appropriate but necessary.

The Tribes contend that recent decisions of the Court have established "clear and precise principles" that require no clarification. Tribes' Brief at 3-4. Indeed, reviewing those decisions by themselves, the City might well agree. However, the Court's opinions have since received widely variant interpretations, a prime illustration being the argument presented by the Tribes in support of the lower court's opinion in the instant case. The approach taken by the Tribes, which essentially reiterates that of the Court of Appeals, reflects a strained reading of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and in fact, is directly at odds with the apparent meaning of that opinion.

The Tribes first point to the lack of language of cession in the 1904 Act at issue and assert that the "presence or absence" of such language is "a key indication of congressional intent." Tribes' Brief at 5. It is correct that the presence of language of cession is indicative of an intent to disestablish. Rosebud Sioux Tribe v. Kneip, supra at 592; DeCoteau v. District County Court, 420 U.S. 425, 445 (1975). However, it does not follow that the absence of such language signifies an opposite intent, as the Tribes apparently suggest. In Rosebud, for example, no such explicit language appeared

in the 1907 Rosebud Act, one of the three surplus lands acts found to have disestablishment effect. Id. at 608-09. Despite the total absence of explicit language of disestablishment, the Court stated that the substance of the 1907 Act was "identical" to that of the 1904 Rosebud Act, which contained cession language. Id. at 608. Furthermore, the Court explicitly noted that "the notion that such express language in an Act is the only method by which congressional action may result in disestablishment is quite inconsistent with [Mattz v. Arnett, 412 U.S. 481 (1973)]." Id. at 588 n. 4 (emphasis in original).

Similarly, the Tribes stress the absence of any agreement reached between the Indians and the government claiming that this Court in Rosebud emphasized "the presence of a cession agreement as a prerequisite to a finding of diminishment." Tribes' Brief at 5. Such a holding appears nowhere in Rosebud, and the opinion in fact clearly indicated otherwise. Of the three statutes at issue in that case, only one - the 1904 Act - was preceded by a formal cession agreement in accordance with treaty provisions.[1] 430 U.S. at 590-91. Even the latter agreement was not incorporated verbatim into the

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1. No agreement was negotiated as to the land opened by the 1910 Rosebud Act. 430 U.S. at 610. The 1907 Act was preceded by an agreement, but the agreement was consented to only by a simple majority rather than the three-fourths vote required by treaty. Id. at 606.

1904 Act, but instead was unilaterally altered by Congress.

It must be remembered that the focus in the context of reservation disestablishment is the intent of Congress. Rosebud, supra at 586-87. While it is true that Congress often opened Indian lands to non-Indian settlement by way of cession agreements or treaties with the Indians, this Court had established by 1904 that the same could be accomplished without Indian consent by unilateral act of Congress. See Rosebud at 587-88, 594; Lone Wolf v. Hitchcock, 187 U.S. 553, 594 (1903). As the Court in Rosebud stated, Congress was fully aware of this power when the Flathead Act was passed in 1904. Id. at 587-88, 593-94 & n.13, 595 n.17, 598 & n.19. Nevertheless, as this case demonstrates, lower courts continue to emphasize the presence of a cession agreement as a sine qua non to a finding of disestablishment.

The Tribes describe the school lands provision and the intoxicants provision of the Flathead Act as "isolated facts" which are "far outweighed" by more significant factors. Tribes' Brief at 7. However, the reading given nearly identical provisions in Rosebud suggests that the only logical conclusion to be drawn from such provisions is that disestablishment was intended by Congress. It would seem that these provisions, appearing on the face of the Act, would be highly salient factors this inquiry and would not easily be "outweighed" by the highly questionable arguments urged by the Tribes.

The Tribes also stress the contrast between the 1904 Presidential Proclamation opening a part of the Rosebud Reservation and the 1909 Proclamation opening the Flathead Reservation, and confess a failure to understand the City's argument on this point. It must be remembered that there were actually three Rosebud Proclamations - one implementing each surplus lands act - and neither the 1908 or 1911 Rosebud Proclamations contain cession language. See Proclamation of August 24, 1908, 35 Stat. 2203; Proclamation of June 29, 1911, 37 Stat. 1691. As the City stated in its Petition, these later Proclamations resemble the 1909 Flathead Proclamation, and differ from the 1904 Rosebud Proclamation in the same manner as does the Flathead Proclamation. In holding that all three Rosebud Acts had the same disestablishment effect, this Court did not attribute any significance to the differences between the first and subsequent Rosebud Proclamations, and the emphasis placed on similar differences between the first Rosebud Proclamation and the Flathead Proclamation is therefore entirely misplaced.

The United States makes the surprising suggestion that the issue at hand has been decided before, in the course of "[m]ore than forty years of litigation." Brief of U.S. at 9-10. To the contrary, however, the effect of the 1904 Act on the status of the original reservation had never been decided in any reported case prior to the District Court's first decision in this litigation in 1974. See State App., No. 82-22, pp. 167, 178. A careful

examination of the decisions cited by the United States reveals that none of them discuss the effect of the 1904 Act but indeed simply speak of the Flathead Reservation as if it continued to exist.[2] It is true that the Montana Supreme Court in 1951 decided that the State lacked jurisdiction over fee lands within the original reservation boundaries on the basis of 18 U.S.C. § 1151. State ex rel. Irvine v. District Court, 125 Mont. 398, 239 P.2d 272. However, the question presented here was not before the Court in that case since the State argued only that the lands were not "Indian country" because they had been patented in fee to non-Indians.[3] Other

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2. One of the early cases cited by the United States, which does mention the 1904 Act, is Pronovost v. United States, 232 U.S. 487, 489 (1914). In Pronovost, the Court took judicial notice of the continued existence of the Flathead Reservation, but by citing only those portions of the 1904 Act which reserved certain lands from settlement for the benefit of the Tribes, implied that the reservation existed only to the extent of those lands specially reserved. Id. at 489. Moreover, the Court clearly suggested that the City of Polson was no longer within the Flathead Reservation. Id. at 490.

3. This is an understandable argument in view of the fact that, until the revision of the Indian jurisdictional statutes in 1948, "Indian country" status was based on Indian title or exclusive Indian occupancy under Government supervision. See, e.g., United States v. McGowan, 302 U.S. 535 (1938); Clairmont v. United States, 225 U.S. 551 (1912); Browning v. United States, 6 F.2d 801, 802-07 (8th Cir. 1925); Ex Parte Ray, 54 F. Supp. 218,

than the previous decisions in this litigation, there is no judicial precedent which stands for the assertion that the 1904 Act did not operate to disestablish the original Flathead Reservation.

Despite the apparently clear holding of this Court, this area of the law continues to be plagued with uncertainty, continued litigation, and contradictory results. In view of the great jurisdictional significance such cases have for substantial portions of the western and central states, the situation is an appropriate one for the intervention of this Court.

(cont.)
221 (W.D.N.Y. 1943); State v. Youpee, 103 Mont. 86, 61 P.2d 832, 833 (1936).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petitions and the supporting Amici brief, the Petition for Writ of Certiorari should be granted.

Dated this 24th day of September, 1982.

Respectfully submitted,

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No. 81-2406

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF POLSON, MONTANA,

Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF LAKE COUNTY, MONTANA, et al., AND THE STATES OF NEBRASKA, OKLAHOMA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITION

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The following States, by their respective Attorneys General, join in the views expressed herein:

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The following counties join in the views expressed herein:

Clearwater County, Minnesota
Mahnomen County, Minnesota
Glacier County, Montana
Sioux County, North Dakota
Dewey County, South Dakota
Ziebach County, South Dakota
Duchesne County, Utah
Uintah County, Utah

Certain other interested States and Counties did not have an opportunity to fully examine the merits of the question presented prior to the printing of this Brief. The Office of the Clerk will be advised directly if those States or Counties elect to join in the views expressed herein.

The States and Counties joining herein have submitted this brief because of their interest in the manner in which questions of Indian reservation status are decided by the courts. The States and Counties share the concern of the City of Polson that this area of the law is in need of further resolution by this Court and that the decision of the court below ought to be reversed.

The question of reservation status is of particular interest to states and counties containing areas which were originally established as Indian reservations, since the extent to which the states and their political subdivisions may exercise jurisdiction within such an area depends to a significant extent on whether the area continues to be a legally established reservation. Within any existing reservation area, states and their subdivisions lack a considerable degree of regulatory and taxation authority. See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976). In addition, in those states which are not covered by Public Law 280 (18 U.S.C. § 1162), 28 U.S.C. § 1360),[1] the general civil and criminal jurisdiction of state and local governments is severely restricted. See, e.g., DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Specifically, Lake County has a special interest in this case because a substantial portion of the County is included within the original Flathead Reservation area at issue in this case. Lake County, therefore,

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1. Such States include Oklahoma and Utah. Also, as explained in the Petition at 6 n.2, Public Law 280 applies only in part to the Flathead area.

has the same particular jurisdictional problems as does the City of Polson. See Petition at 5-6. The interest of certain of the other Counties arises because they are presently involved in litigation regarding similar statutes affecting original reservation areas within their boundaries. See Bartlett v. Solem, No. 82-1582 (8th Cir.) (appeal pending) (Sioux, Corson, Dewey, and Ziebach Counties); Ute Indian Tribe v. Utah, 521 F. Supp. 1072 (D. Utah 1981), appeal pending, Nos. 81-1827 and 81-1901 (10th Cir.) (Duchesne and Uintah Counties); White Earth Band of Chippewa Indians v. Minnesota, ____F.2d ____, Nos. 81-1805, 81-1833, 81-1861, 81-1862 (8th Cir., May 14, 1982) (Clearwater and Mahnomen Counties).

The amici States and Counties, like the Petitioner, believe that recent judicial interpretations of Indian surplus lands acts have been inconsistent and confused, despite this Court's pronouncements in DeCoteau v. District County Court, 420 U.S. 425 (1975), and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). See Petition at 7-9. The various decisions of the courts below, even those within particular circuits, cannot be reconciled with one another nor with the decisions of this Court.

This situation is amply illustrated by the case at hand, in which the Ninth Circuit held that the 1904 surplus lands statute in question cannot be likened to one passed the same day and interpreted in Rosebud, because of a difference in language between the statutes. In so doing, however, the court failed to acknowledge the clear holding of this Court in Rosebud that language of the type used in the Flathead statute is not dispositive

and is entirely consistent with a finding of disestablishment. See Petition at 23, 26.

Another illustration of the present confusion is the situation regarding the Cheyenne River Indian Reservation in South Dakota. Since the passage in 1908 of a surplus lands act regarding that reservation, there have been no fewer than ten published opinions commenting on the effect of that legislation, and the matter has still not been resolved. In recent years, the South Dakota Supreme Court and the Eighth Circuit Court of Appeals have been exchanging opposing decisions on the matter. Compare State v. Janis, 317 N.W.2d 133 (S.D. 1982), and Stankey v. Waddell, 88 S.D. 104, 256 N.W.2d 117 (1977), with United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem., 446 U.S. 980 (1980), and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973).

Under these circumstances, and because of the profound jurisdictional significance of decisions of this type, the amici States and Counties feel that the questions involved in this case merit review by this Court. The States and Counties therefore concur in the arguments advanced in the Petition for a Writ of Certiorari and urge that the Petition be granted.

Respectfully submitted,

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